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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR UNITED STATES MARITIME ALLIANCE LIMITED AND CARRIERS CONTAINER COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION[1]

The United States Court of Appeals for the Fourth Circuit ruled that the States' sovereign immunity trumps Congress's power to authorize private litigants to obtain redress against state commercial instrumentalities before federal administrative agencies for the instrumentalities' violations of federal law. The Fourth Circuit's decision upsets the plan of the convention that binds the States to the supremacy of federal regulation of objects that were committed by the Constitution to federal sovereignty. The decision of the court of appeals should be reversed.

INTEREST OF THE *AMICI CURIAE*

A. What They Have Done

In 1994, Respondent South Carolina State Ports Authority ("SCSPA") petitioned the Federal Maritime Commission ("FMC"), the petitioner in this case, for approval of certain amendments SCSPA proposed to include in its FMC-filed terminal tariff, which prescribes the terms and conditions SCSPA imposes on customers and contractors utilizing its marine terminal facilities in the Port of Charleston. *See Petition of South Carolina State Ports Auth. For Declaratory Order*, Docket No. 94-24, Final Decision (FMC Aug. 12, 1997), *available at http://www.fmc.gov/dockets/94-24.ord.* SCSPA's proposed tariff amendments included guidelines for the licensing by SCSPA of stevedores and marine terminal operators allowed to use SCSPA's

1. In accordance with SUP. CT. R. 37.6, this is to confirm that no part of this brief was authored by counsel for any party and that only the *amici curiae* contributed monetarily to the preparation and submission of this brief.

facilities and for reserving to SCSPA itself certain terminal functions at the facility, thus denying competitors access to its publicly-owned facilities to perform these functions. Carriers Container Council, Inc. ("CCC"), which joins in this *amici curiae* brief, was permitted by the FMC to intervene in opposition to SCSPA's tariff amendments to protect CCC's carrier-members' right to use the services of stevedores and marine terminal operators of their own choosing. CCC also protested the tariff amendment requiring applicants for stevedore licenses to promote commerce through Charleston because it would unjustly discriminate against multi-port stevedores in violation of federal shipping law.

Just last year CCC and United States Maritime Alliance Limited ("USMX"), the other *amicus* joining in this brief, contemplated the filing of a complaint with the FMC against SCSPA for imposing restrictions at its facility that prohibited CCC's and USMX's carrier-members from utilizing a gate at SCSPA's Charleston terminal that was operated by a marine terminal company that competed with SCSPA. SCSPA staffs its gate with state employees; the competing terminal operator uses longshore workers represented by the International Longshoremen's Association, AFL-CIO ("ILA"). SCSPA's restriction prevented CCC's and USMX's carrier-members from complying with the obligation in their collective bargaining agreement with the ILA that requires them to use longshore workers represented by the ILA.

B. Who They Are

USMX and CCC are non-profit membership associations which are the principal management, multiemployer, collective bargaining representatives for employers of longshore workers on the Atlantic and Gulf Coasts of the

United States. USMX is an association of ocean carriers, port associations, marine terminal operators, and stevedoring companies. USMX's members handle virtually all of the general cargo shipped through United States ports on the East and Gulf Coasts. CCC is an association of the major United States and foreign ocean carriers serving United States ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 25 members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 50 million tons of containerized cargo in the foreign trades of the United States. This cargo volume amounts to approximately three-fourths of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

The principal mission of USMX and CCC is to represent their members in collective bargaining with the ILA — the labor organization that represents dockworkers employed on the Atlantic and Gulf Coasts. USMX is the lead negotiator in Master Contract negotiations with the ILA covering ports from Maine to Texas; CCC is primarily responsible for Master Contract administration. This Master Contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores.

USMX and CCC also represent their members' interests in regulatory matters that affect their business and labor practices. The carrier-members of these associations are the customers of Respondent SCSPA and other state port authorities operating marine terminals in United States ports. The stevedoring- and marine-terminal-members of USMX are the competitors and contractors of these state authorities. In the past, federal shipping law has provided CCC, USMX,

and their members with the means to challenge actions taken by these state port authorities that interfered with the commercial interests of the members of CCC and USMX or impeded the administration of their collective bargaining agreements with the ILA.

C. What Their Interest Is

The extension by the court of appeals in this case of the doctrine of sovereign immunity to proceedings before federal administrative agencies is a crucial issue of constitutional law that affects the interests of CCC, USMX, and their members. If the decision of the court of appeals in this case is allowed to stand, the members of USMX, CCC, and other bargaining and trade associations in the maritime industry will be deprived of the rights provided by Congress to obtain recourse for shipping law violations committed by state commercial instrumentalities operating marine terminals that are essential for the conduct of the members' transportation businesses. These shipping law violations not only may affect the members' commercial interests but also may have a significant impact upon their collective bargaining interests. Indeed, over the years the FMC has decided shipping law cases that have had a direct and immediate impact on collective bargaining in the maritime and longshore industries. *See, e.g., Volkswagenwerk AG v. FMC*, 390 U.S. 261 (1968); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 488 US. 1041 (1989); *Boston Shipping Ass'n v. FMC*, 706 F.2d 1231 (1st Cir. 1983).

The *amici* joining in this brief will present the views of customers, competitors, and contractors of state-operated marine terminals and thus provide the perspective of private enterprise in a case that centers on an intergovernmental

controversy. *Amici Curiae* USMX and CCC and their members have a vital and compelling interest in the singularly important constitutional issue involving the applicability of the doctrine of the States' sovereign immunity in federal administrative complaint proceedings.[2]

SUMMARY OF ARGUMENT

The concept of dual sovereignty inherent in our system of government divides sovereign powers between the government of the Union and those of the States. By entering the Union, the States submit to the plan of the convention which requires a *pro tanto* relinquishment of the States' sovereignty to the federal government. Part of that relinquishment includes the States' surrender to the federal government of sovereignty over the regulation of maritime commerce. In enacting the federal shipping statutes, Congress exercises that sovereignty ceded to it by the States. To permit a State through its instrumentality to act in derogation of the prescriptions of federal law would be contradictory and repugnant to the authority granted to the federal government in the plan of the convention.

There is no constitutional impediment to the enforcement of federal law against state commercial instrumentalities in private complaint proceedings before federal administrative agencies. This Court has instructed that an analysis of the proper parameters of the States' sovereign immunity must be informed not only by the language of the Constitution but also by "history, practice, precedent, and the structure of the Constitution." *See Alden v. Maine*, 527 U.S. 706, 754 (1999).

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2. Both Petitioner FMC and Respondent SCSPA have consented to the filing of this *amici curiae* brief. Their written consents have been lodged with the Clerk of the Court.

The language of the Constitution and the prior decisions of this Court have confined the invocation of sovereign immunity to assertions of judicial power against the States. Historically, private complaint proceedings against state instrumentalities involved in activities subject to federal regulation have been a staple of administrative law. This has been particularly true before Petitioner FMC ever since this Court's holding almost a half century ago that state instrumentalities operating marine terminal facilities are subject to regulation under federal shipping statutes. *See California v. United States*, 320 U.S. 577, 585-86 (1944). The decision of the court of appeals, if left undisturbed, places in jeopardy the continuing vitality of private complaint proceedings before the FMC and other federal administrative agencies to redress violations of federal law by state commercial instrumentalities. The principal of constitutional law adopted by the court of appeals is already hindering the enforcement not only of federal shipping laws but also of the whistleblower provisions of federal environmental statutes and the employment discrimination prohibitions of federal immigration statutes.

The decision of the court of appeals in this case is antithetical to the very structure of the Constitution. Dual sovereignty requires that "the two governments — national and state — are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers." *South Carolina v. United States*, 199 U.S. 437, 452 (1905); *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting). Permitting state commercial instrumentalities to invoke immunity in federal administrative proceedings would severely impinge upon the effective furtherance of legitimate federal interests. By the same token, requiring those

instrumentalities to appear before federal agencies to defend complaints by private citizens does no violence to the inherent nature of the States' sovereignty because the instrumentalities are engaging in commercial activities that do not fall within the realm of the States' traditional core governmental functions.

ARGUMENT

State Instrumentalities Engaged In Commercial Activities That Fall Within The Objects Committed By The Plan Of The Convention To The Sovereignty Of The Federal Government Are Subject To Regulation Under Applicable Federal Law By Duly Constituted Federal Regulatory Agencies. There Is No Constitutional Impediment To Requiring Those State Commercial Entities To Defend Complaints Filed By Private Persons In Administrative Proceedings Before The Federal Agencies.

The court of appeals in this case has boldly gone where this Court has never gone before. The court of appeals extended the reach of the doctrine of sovereign immunity, when it ruled that the States of the Union are immune from the exercise of federal Executive Power by an administrative agency established by Congress through the exercise of its Article I powers. It held that a State's sovereign immunity protects it from being brought by a private party not only before a court of law but also before a federal administrative agency (Pet. App. 2a).[3] In the view of the court of appeals, the doctrine of sovereign immunity deprives Congress of the

3. The abbreviation "Pet. App." refers to the separately bound appendix that accompanied the petition for certiorari filed in this case.

authority to permit private parties to hale unconsenting States into *any* adversarial proceeding, including those within the adjudicatory apparatus of federal agencies and commissions (Pet. App. 12a, 25a).

The validity of the rule of decision formulated by the court of appeals turns upon the answers to two separate and distinct questions: (1) did the States in the plan of the convention surrender to the federal government their sovereign immunity over those objects of government regulation delegated to the federal government and, if so, (2) is there any constitutional impediment that prohibits the federal government from exercising the regulatory powers delegated to it by the States over the States themselves in adjudicatory proceedings before federal administrative agencies? *See Employees of Dept. of Public Health & Welfare of Mo. v. Dept. of Public Health & Welfare of Mo.* (hereinafter "*Missouri Employees*"), 411 U.S. 279, 287 (1973) (concurring opinion).

A. States' Surrender of Sovereign Immunity

The common law doctrine of sovereign immunity long predates the Constitution of the United States. *See id.* at 288. Before entering the Union, the States possessed the full aegis of immunity enjoyed by independent sovereigns; upon joining the Union, however, their sovereign immunity was diluted because of the dual sovereignty inherent in our Federalism. *See id.* at 288-89.

"In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the

objects committed to the other." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). By entering the Union, the States submitted to the plan of the convention, which requires a *pro tanto* relinquishment of the States' sovereignty to the federal government.

> At the time our Union was formed, the States for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given to Congress.

Missouri Employees, 411 U.S. at 288 (concurring opinion).

This was certainly the understanding of the nature of dual sovereignty when our Nation was formed. Alexander Hamilton commented that prior to the Constitution every State in the Union enjoyed, "as one of the attributes of sovereignty," the right "not to be amenable to the suit of an individual *without its consent* 'and,' [u]nless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . ." THE FEDERALIST NO. 81, at 521 (Alexander Hamilton) (Robert Scigliano ed., Modern Library Edition, Random House, 2000) (emphasis in original). Hamilton did not discuss the "circumstances which are necessary to produce an alienation of State sovereignty" in FEDERALIST NO. 81 because he had already done so in FEDERALIST NO. 32 "in considering the article of taxation." *See id.* at 521. In Hamilton's view, this alienation or surrender of sovereignty under the plan of the convention, which "aims

only at partial union or consolidation" occurs only in three cases:

> where the Constitution in express terms granted an exclusive authority to the Union, where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant.*

THE FEDERALIST No. 32, at 192 (Alexander Hamilton) (Robert Scigliano ed., Modern Library Edition, Random House, 2000) (emphasis in original).

While there is no language of federal exclusivity or state prohibition in the Constitution, the exercise of federal authority over the regulation of maritime commerce establishes an exclusive federal preserve. Regulation of maritime commerce was one of the governmental objects delegated by the States to the federal government. *See* U.S. CONST. art. I, § 8, cl. 3, 10; art. I, § 9, cl. 5, 6; art. I, § 10, cl. 2, 3. The need to commit regulatory power over maritime commerce to the federal government to thwart the Balkanizing effects of the States' parochial intervention was one of the primary reasons for the adoption of the Constitution. *See United States v. Locke*, 529 U.S. 89, 99 (2000); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The plan of the convention, therefore, called for the States to surrender to the federal government sovereignty over the regulation of maritime commerce.[4]

4. Congress's most recent recourse to federal sovereignty over the regulation of maritime commerce involves pending legislation to

(Cont'd)

In enacting the federal shipping statutes, Congress exercises that sovereignty ceded to it by the States. Congress has created an extensive federal statutory and regulatory scheme, which has as one of its objectives a uniformity of regulation for maritime commerce. *See* 46 U.S.C.A. app. § 1701 (West Supp. 2001) (One of the statutory purposes of federal shipping law is "to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of governmental intervention and regulatory costs.").

This shipping law regime requires marine terminal operators "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property" and to refrain from giving "any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C.A. app. §§ 1709(d)(1), 1709(d)(4) (West Supp. 2001). A marine terminal operator is "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. . . ." 46 U.S.C.A. app. § 1702(14) (West Supp. 2001). The term "person" includes "individuals, corporations, partnerships, and associations existing under or authorized

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establish uniform, national standards for seaport security, *see* Port and Maritime Security Act of 2001, S. 1214, 107th Cong. § 2(17) (July 20, 2001), which has generated intense interest in the wake of the recent terrorist attacks upon our Nation ("It is in the best interests of the United States . . . to be mindful that United States seaports are international ports of entry and that the primary obligation for the security of international ports of entry lies with the Federal government. . . .").

by the laws of the United States or of a foreign country." 46 U.S.C.A. app. § 1702(18) (West Supp. 2001).

State instrumentalities by virtue of their operation of marine terminal facilities are "persons" subject to regulation under the provisions of the federal shipping statutes that govern the conduct of marine terminal operators. *See California v. United States*, 320 U.S. 577, 585-86 (1964).

> [I]t is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies.

See id. at 586.

To permit a State through its instrumentality to act in derogation of the prescriptions laid down by Congress in federal shipping law would be contradictory and repugnant to the authority granted to the federal government in the plan of the convention. The States by empowering Congress to regulate maritime commerce surrendered to exclusive congressional control that portion of their sovereignty that would conflict with that federal regulation. *See Missouri Employees*, 411 U.S. at 288 (concurring opinion).

B. No Constitutional Immunity From Administrative Adjudicatory Proceedings

The second prong of the analysis concerns the presence of any constitutional impediment to the enforcement of congressionally created rights under federal shipping law by private litigants against the instrumentalities of the States that engage in activities subject to shipping law regulation. "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Alden v. Maine*, 527 U.S. 706, 732 (1999).

1. Confinement of Sovereign Immunity Doctrine To Judicial Arena

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), the Court ruled that the principle of state sovereign immunity embodied in the Eleventh Amendment[5] prevents congressional authorization in federal enactments of suits by private parties in the federal courts against unconsenting States. *Seminole Tribe* awakened the echoes of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), which had observed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

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5. The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

In *Alden v. Maine*, 527 U.S. 706 (1999), the Court held that the sovereign immunity of the States extends to private suits to enforce federal statutory rights in state courts. In the view of the *Alden* Court, the sovereign immunity of the States derives not from the literal language of the Eleventh Amendment, which "confirmed rather than established sovereign immunity as a constitutional principle," but from the structure of the original Constitution itself. 527 U.S. at 728-29.

The decisions of this Court have confined the doctrine of sovereign immunity to assertions of judicial power against the States. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, J. dissenting) ("*Seminole Tribe* . . . leaves open a State's liability upon enforcement of federal law by federal agencies."). The reason for restricting application of sovereign immunity to judicial proceedings would seem to be compelled by the language of the Constitution itself. The limitations in the Eleventh Amendment by its express terms rein in only the "Judicial power of the United States." This Court, however, has rejected strict reliance on the words of the Eleventh Amendment alone in defining the parameters of the States' sovereign immunity. *See Alden*, 527 U.S. at 730. This Court's analysis has been informed not only by the words of the Constitution but also by "history, practice, precedent, and the structure of the Constitution." *See id.* at 754.

2. Resort of Court of Appeals To Ahistorical Literalism

The court of appeals in this case did exactly what the *Alden* Court warned not to do — resort to an uncritical reliance on "ahistorical literalism." *See id.* at 730. The court of appeals latched onto one passage from the majority opinion in *Alden*

and converted it into an unconditional license to permit the States to invoke sovereign immunity not only in the judicial arena but also in the federal administrative arena. In *Alden* this Court recognized the existence of the presumption mentioned in *Hans v. Louisiana*, 134 U.S. 1, 18 (1890): "the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution — anomalous and unheard of when the constitution was adopted." *See Alden*, 527 U.S. at 727. What the *Hans* Court was referring to were suits and proceedings by an individual against a State — suits and actions unknown to the law, and forbidden by the law, which were not justiciable in the courts at the time the Constitution was adopted because they were brought against a sovereign. *See* 134 U.S. at 15.

The court of appeals in this case interpreted this passage from *Hans* not from the perspective of the Nineteenth Century author of the opinion but from the perspective of a Twenty-First Century reader. While Justice Bradley in referring to "proceedings or suits" meant those in equity or at law that could only be brought in a judicial forum, Chief Judge Wilkinson of the Fourth Circuit read the same disjunctive phrase as distinguishing "suits," which could be brought only in courts of law, from "proceedings," which were not suits and presumably could be brought before any adjudicatory body (Pet. App. 8a). Judge Wilkinson thus viewed *Alden* as sufficient authority for the holding that "sovereign immunity bars not just lawsuits filed in courts of law, but rather *all* proceedings against a non-consenting sovereign." (Pet. App. 8a) (emphasis added). The court of appeals adopted this expansive definition of the States' sovereign immunity without subjecting its formulation to the enlightenment of "history, practice, precedent, and the structure of the Constitution." When the appropriate calculus is applied, the invalidity of the formulation of the court of appeals becomes evident.

3. Lack of Support For Decision Below In Precedent, History, Or Practice

Neither precedent, history, nor practice supports the decision of the court of appeals. The rule of decision by the court of appeals is not only unprecedented but mischievous. It places in jeopardy the continued vitality of enforcement mechanisms that have in practice formed the backbone of the federal regulatory system. Many federal enactments contain administrative procedures that enable private litigants to commence complaint proceedings before federal agencies to obtain redress for violations of the substantive provisions of these federal statutes. Private litigants are the agencies' eyes and ears. These private parties bring to the agencies' attention possible infringements of federal law that would otherwise go undetected if enforcement were to depend solely upon the limited resources of the agencies themselves. Indeed, in its decision in this case, Petitioner FMC explained that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." (Pet. App. 33a).

Historically, private complaint proceedings against state instrumentalities involved in activities subject to federal regulation have been a staple of administrative law. This is particularly true before Petitioner FMC. Almost a half century ago this Court held that state instrumentalities by virtue of their operation of marine terminal facilities are "persons" subject to regulation under federal shipping statutes. *See California v. United States*, 320 U.S. 577, 585-86 (1944). Indeed, over the years Respondent SCSPA and its counterparts in other ports have been brought before the FMC in complaint proceedings commenced by private parties to redress alleged shipping law violations by these state

instrumentalities.[6] At no time prior to this case was there ever any question raised that this type of administrative proceeding was an impermissible infringement of the instrumentalities' sovereign immunity.

It has always been a fact of life in the shipping industry that state port authorities engaged in the business of marine terminal operations subject to the shipping laws of the United States must defend complaint proceedings brought against them before the FMC. Indeed, for the first 37 years of SCSPA's existence, from its formation in 1962 until 1999, there was never any doubt voiced by SCSPA as to this regulatory obligation. In 1999, however, the SCSPA amended

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6. *See Ryan Walsh, Inc. v. Port of Houston Auth.*, No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm; Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997); *Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't*, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989); *Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth.*, 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988); *Harrington & Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted* , 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986); *Southeastern Mar. Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986); *Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985); *South Carolina State Ports Auth. v. Georgia Ports Auth.*, 22 Shipping Reg. Rep. (P&F) 1111 (FMC 1984); *United States Lines v. Maryland Port Admin.*, 23 F.M.C. 441 (1980); *Bethlehem Steel Corp. v. Indiana Port Comm'n*, 21 F.M.C. 629 (1979).

the terminal tariff it files with the FMC governing the terms and conditions SCSPA sets for use of the marine terminals it operates in South Carolina to include an express choice of forum clause. The amendment provides that every person utilizing SCSPA's marine terminals consents to the jurisdiction of the South Carolina state courts in any actions against the SCSPA arising from the terminal services the Authority furnishes except for "actions brought pursuant to Acts of the Congress of the United States that expressly designate the jurisdiction in which such actions should be brought and from which the Authority would not have sovereign or eleventh amendment immunity." SCSPA's Terminal Tariff No. FMC-T No. 8, Rule 34-021 (effective Jan. 6, 1999), *available at http://www.port-of-charleston. com.* While the tariff amendment contains an implicit recognition that SCSPA is answerable in those tribunals designated by Congress, which in the case of state-operated marine terminals, like SCSPA, undoubtedly mean the Federal Maritime Commission, the amendment for the first time in SCSPA's history invokes the concept of sovereign or Eleventh Amendment immunity as a possible impediment to the exercise of jurisdiction by that congressionally designated tribunal.

The intrusion of the doctrine of sovereign immunity into the federal regulatory regime is hindering the enforcement of other federal statutes besides the shipping acts. The enforcement of "whistleblower" provisions enacted by Congress in federal environmental statutes has been affected.[7] Within the last year

7. 15 U.S.C.A. § 2622 (West 1998) (Toxic Substance Control Act); 33 U.S.C.A. § 1367 (West 1986) (Water Pollution Prevention & Control Act); 42 U.S.C.A. § 300j-9(i) (West Supp. 2001) (Safe Drinking Water Act); 42 U.S.C.A. § 5851 (West 1995) (Energy Reorganization Act); 42 U.S.C.A. § 6971 (West 1995) (Solid Waste Disposal Act); 42 U.S.C.A. § 7622 (West 1995) (Clean Air Act); (Cont'd)

and a half, four federal district courts, including one that relied heavily on the decision of the court of appeals in this case, invoked the sovereign immunity doctrine to bar federal administrative proceedings commenced by whistleblowers seeking recourse for retaliatory or discriminatory actions taken against them by their state employers.[8] Administrative proceedings before the Executive Office For Immigration Review by employees seeking recourse under the Immigration Reform and Control Act, 8 U.S.C.A. § 1324a (West 1999 & Supp 2001), for citizenship-based employment discrimination by state instrumentalities have been outlawed by the United States Court of Appeals for the Tenth Circuit in a decision in which the court of appeals simply assumed without discussion that the administrative proceeding qualified as a lawsuit for sovereign immunity purposes. *See Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994). The Tenth Circuit's ruling has shut the door of the Executive Office For Immigration Review to victims of citizenship-based employment discrimination by state employers.[9]

(Cont'd)
42 U.S.C.A. § 9610 (West 1995) (Comprehensive Environmental Response Compensation & Liability Act).

8. *Connecticut Dept. of Environmental Protection v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *Ohio Environmental Protection Agency v. United States Dept. of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000); *Rhode Island v. United States*, 115 F. Supp. 2d 269 (D. R.I. 2000).

9. *See Wong-Opasi v. Tennessee*, 2000 OCAHO LEXIS 2 (Jan. 11, 2000); *Elhaj-Chehade v. University of Texas*, 1999 OCAHO LEXIS 3 (Jan. 28, 1999); *Kupferberg v. University of Oklahoma Health Sciences Center*, 1994 OCAHO LEXIS 99 (Nov. 21, 1994).

4. Lack of Support For Decision Below In Structure of Constitution

The structure of the Constitution is antithetical to the formulation proposed by the court of appeals in this case. Dual sovereignty requires a balancing of state and federal powers. Congress may not exercise its delegated powers "to infringe on certain fundamental aspects of state sovereignty that are essential to 'the States' separate and independent existence.' " *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting). "In other words, the two governments — national and state — are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers." *South Carolina v. United States*, 199 U.S. 437, 452 (1905).

The decision of the court of appeals in this case has nationwide ramifications that threaten the traditional enforcement mechanisms of federal regulation. Extending the reach of state sovereign immunity to administrative proceedings permits state entities to violate federal law with impunity. Whistleblowers and other employees will be vulnerable to discharge and employment discrimination for which they have no relief. This lack of personal recourse hardly encourages the reporting by state employees of violations of federal environmental law. By the same token the members of the *amici curiae* submitting this brief will be virtually powerless to vindicate their shipping law rights against state port authorities, which act not as governmental regulators but as private entrepreneurs. The suggestion that the federal agencies themselves can effectively compel

compliance by state instrumentalities with federal law[10] suffers from an overly optimistic appraisal of the capabilities and resources of federal regulatory bodies. *See Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting).

Permitting state instrumentalities to invoke immunity in federal administrative proceedings severely impinges upon the effective furtherance of legitimate federal interests. It interferes with the mission entrusted to the federal government in the plan of the convention. By the same token, subjecting state instrumentalities engaged in commercial activities that fall within the objects committed by the Constitution to the federal government's regulation under applicable federal law by duly constituted federal regulatory agencies does not interfere with the sovereign powers retained by the States: fire prevention, police protection, sanitation, and public health, and similar public services "remote from any normal concept of interstate commerce [but] . . . traditional governmental functions . . . engaged in by state and local governments that affect the everyday lives of citizens." *Garcia*, 469 U.S. at 575 (Powell, J., dissenting).

What subjecting state commercial instrumentalities to regulation by federal agencies under federal law does do is confirm and give effect to the longstanding understanding of all those private and governmental commercial enterprises operating within the realm of federal regulation that state sovereign immunity has never sanctioned special treatment for state commercial instrumentalities. The mark of effective

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10. The doctrine of state sovereign immunity does not shield the States from suits brought by the federal government. *Alden v. Maine*, 527 U.S. 706, 755-56 (1999); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

regulation is evenhandedness. State commercial entities and private market participants expect a level playing field where they are subjected to the same regulatory obligations, including the need to respond to complaints before federal regulators for alleged violations of federal law.

> When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily at private conduct.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 694-95 (1999) (Breyer, J. dissenting) (citations omitted).

The constitutional grant of sovereignty to the federal government over maritime commerce was not conditional. The power to regulate includes the adoption of not only substantive law but also appropriate remedies and procedures essential to the fulfillment of the regulatory objectives embodied in the substantive provisions. By engaging in the profit-making operation of marine terminals in their ports, the States implicitly surrender their sovereignty and submit to the regulatory sovereignty over maritime commerce they granted exclusively to the federal government in the constitutional compact. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

Inherent in this submission to the sovereignty of the federal government is the acceptance of the regulatory rules both substantive and procedural enacted by the Federal Sovereign. That the regulatory regime includes having to defend complaint proceedings brought by private persons does not constitute coercive and disrespectful overriding of the sovereign immunity of the States. The state commercial instrumentality in this case voluntarily chose to engage in an enterprise which it well knew fell within the regulatory sovereignty of the federal government. To submit to the regulatory jurisdiction of the Federal Maritime Commission, the agency entrusted by Congress with the enforcement of federal shipping laws, is perfectly consistent with the constitutional plan, which South Carolina and all the other States have ratified.

CONCLUSION

The novel extension by the court of appeals in this case of the States' sovereign immunity doctrine to administrative proceedings before federal agencies imposes a constitutionally unwarranted burden upon the federal regulatory system. Principles of federalism implicit in our system of dual sovereignty bind the States to the sovereignty they granted to the federal government. Requiring state commercial port authorities to defend complaint proceedings brought by private persons before the federal agency entrusted by Congress with the enforcement of federal shipping law does not infringe on the States' traditional, core governmental functions but furthers the federal regulation of commerce consistent with the constitutional plan approved by the States. Accordingly, the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit should be reversed, and the case remanded to Petitioner Federal Maritime Commission for disposition of the merits of the administrative complaint filed against Respondent South Carolina State Ports Authority.

Respectfully submitted,

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